PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

RICHARD N. FLOWERS,	)	
	)	**ULP No. 04-10-453**
Petitioner,	)	
	)	Decision
STATE OF DELAWARE DEPARTMENT OF	)	
TRANSPORTATION, DELAWARE TRANSIT CORP.,	)	
Respondent.	)	

BACKGROUND

The State of Delaware Department of Transportation, Delaware Transit Corporation ("DTC") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1986) ("PERA").

Charging Party Richard N. Flowers ("Mr. Flowers") was a Fixed Route Operator employed by Delaware Transit Corporation in New Castle County, Delaware. At all times relevant to this charge, Mr. Flowers was a member of Amalgamated Transit Union, AFL-CIO, Local Union 842 ("ATU"), which is the exclusive bargaining representative of DTC Fixed Route Operators within the meaning of 19 Del.C. §1302(j).

DTC and ATU are parties to a collective bargaining agreement for the period of December 1, 2002, through November 30, 2007, which defines the negotiated terms and conditions of employment for the bargaining unit which includes Fixed Route Operators. This agreement was in effect at all times relevant to this charge.

On or about October 4, 2004, Mr. Flowers filed an unfair labor practice charge in which he alleged violations of 19 Del.C. §1307 (a)(1) through (a)(8). Specifically the Charge alleged

that DTC refused to process grievances filed by the Mr. Flowers and that DTC managers threatened and then terminated him in retaliation for his engaging in activities which are protected under the PERA. The Charge also alleged interference with rights of public employees protected by 19 Del.C. §1303. Mr. Flowers requested that PERB find DTC in violation of the statute and order his discharge be rescinded and he be made whole. He further requested the awarding of attorney's fees arguing DTC blatantly attempted to "discourage, undermine and punish the employee in retaliation for using the protections guaranteed by collective bargaining."

On October 8, 2004, DTC filed its Answer, in which it denied all the material allegations contained in the Charge. The Answer also included New Matter asserting the Charge should be dismissed because the Charging Party refused to participate in the grievance procedure, or alternatively, deferred to the contractual grievance and arbitration procedure because the underlying issue is whether there was just cause for Mr. Flowers' discharge.

On October 18, 2004, Charging Party filed a Response, denying the New Matter asserted by DTC.

A probable cause determination was issued on December 14, 2005, dismissing the alleged violations of 19 Del.C. §1307 (a)(2), (5), (7), and (8). The pleadings did, however, "identify and support factual and legal issues sufficient to establish probable cause to believe that DTC may have violated 19 Del.C. §1307 (a)(1), (3), (4), and/or (6).[1]"

[1] 19 Del.C. §1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure, or other terms and conditions of employment.

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibilities to regulate the conduct of collective bargaining under this chapter.

An informal conference was convened by the Hearing Officer on January 13, 2005, during which the issues for hearing were defined. The hearing was conducted over three days, on February 23; April 12; and April 13, 2005, during which both sides were afforded full opportunity to present evidence in support of their respective positions.

Charging Party's closing argument was received by electronic transmission on June 6, 2005. DTC's written closing argument was received on July 15, 2005, and Charging Party's rebuttal argument was received on August 5, 2005.

This decision is based upon the record created by the parties as described above.

RELEVANT FACTS [2]

Richard N. Flowers was hired by DTC as a Fixed Route Operator on or about February 10, 2000. His employment was formally terminated by letter dated September 28, 2004, as a result of an incident which occurred on his bus on August 13, 2004.

On Friday, August 13, 2004, Operator Flowers was on duty and drove his bus to Rodney Square in Wilmington in the late afternoon. One of the male passengers on the bus told Operator Flowers to hold the bus while the passenger went across the street to the library to talk to his girlfriend. Operator Flowers told the passenger he could not wait and the passenger became irate. The passenger got back on the bus, made "vulgar statements", moved to the back of the bus from where he yelled profanity and threatened Operator Flowers. Operator Flowers told the passenger, "If you don't stop, you're off this bus," at which point the passenger responded, "I'll shoot you." Operator Flowers was then able to get the passenger off of the bus and prepared to proceed to the next stop on his route.

[2] The facts are derived from the evidence of record in this case. Fourteen witnesses testified over the three days of hearing. Witnesses were sequestered during the course of the hearing. Every effort was made during the hearing to assist Charging Party who proceeded *pro se*. However, much of the testimony presented in support of the charge was not relevant or material to a consideration of whether DTC violated the statute as alleged.

Another driver at Rodney Square (who saw that Mr. Flowers was having a problem) called the Street Supervisor, Tonnie Gallman. Supervisor Gallman stopped Operator Flower's bus and asked about the problem. Operator Flowers related his version of the story, stating the passenger had threatened him and that he did not feel safe in transporting that passenger. Mr. Gallman then spoke with the passenger, returned to the bus, told Operator Flowers the passenger did not seem to be a threat, and directed Flowers to allow the passenger to ride and to get the bus back on schedule. Operator Flowers then "marked off"[3] rather than transport the passenger and Supervisor Gallman called for another driver and bus to finish Mr. Flowers' shift.

Supervisor Gallman's version of this incident differs from Operator Flowers' and was captured in his Incident Report, dated 6:15 p.m., August 13, 2004, which states:

> Approx. 6:10 p.m. I was called to bus 541. Op. Flowers was having an altercation with a male passenger. As I approached the bus, the doors opened and the young man stepped off stating that this driver has a attitude problem. I told him to slow down and explain to me what happen. *[sic]* That's when Op. Flowers yelled out the door that this guy "Basil Buie" threaten *[sic]* him. So I told Op. Flowers that "to be quite *[sic]* and let me talk to Mr. Buie." Mr. Buie said that when the bus pulled up irately, and he boarded the bus, he asked Op. Flowers, "You don't like picking up peoples, do you?" and that when Op. Flowers became irate with him, threating *[sic]* to put him off the bus. That's when I arrived. After a brief conversation with Op. Flowers, I told him that our main concern was to get these people home and told Mr. Buie to get back on the bus and don't say anything to the driver. And I told Op. Flowers not to say anything to Mr. Buie. That's when Mr. Flowers yelled out the door that he was not going to transport Mr. Buie anywhere because he was a dangerous man. That's when I told Op. Flowers that if he did not get this bus back on schedule, I will have to get another driver to replace him. He then said, "Send me home. I can go home because I am not going to take him anywhere." That's when I called dispatch to look for a replacement driver. Once dispatch called and had a replacement driver I told Mr. Flowers to take his bus back to the garage. And I called Mr. Kulesza and Mr. Moulds to inform them of my actions. *State Exhibit 14.*

The following Monday, August 16, 2004, Mr. Flowers was "suspended without pay for insubordinate behavior/failing to following the instructions of a supervisor." By certified letter dated August 17, 2004, he was advised by Acting Chief Transportation Supervisory Charles D.

[3] The term "marked off" refers to an attendance procedure whereby an employee can "mark off" duty. The policy was not entered into evidence nor was the procedure further discussed or defined.

Moulds that a pre-termination hearing was scheduled for August 25. *Charging Party Exhibit 3.* Thereafter, by letter dated September 28, 2004, Mr. Flowers was advised by Department of Transportation Secretary Nathan Hayward that his employment with DTC was terminated effective September 28, 2004.

Following the August 13, 2004 incident on the bus for which Mr. Flowers was suspended, pending termination, he filed a number of complaints which included the following:

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fixed Route Operator Date Grievance Occurred: August 13, 2004

Subject of Grievance: Health and Safety Violation

Statement of Aggrieved: Richard N. Flowers requested that a passenger not be transported because he made a threat against his life. Supervisor Tonnie Gallman refused his request. This violates page 21 of the DART Handbook. It also violates OSHA law. 29 USC 654
I request that Richard Flowers be returned back to work. And that he be made whole.

Date: 8-25-2004 Signature: /a/ Richard Flowers
[State Exhibit 1, State Exhibit 3]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fixed Route Operator Date Grievance Occurred: 8-25-2004

Subject of Grievance: No Fault Attendance Policy

Statement of Aggrieved: On 8-13-2004 at 6:20 p.m. I marked off of work – DART Paul Kulasza and Charles Moulds told me I could not Mark Off. This is a violation of the collective bargaining agreement. Bulletin No. P87-93 "No Just Cause"
I request that Richard Flowers be returned back to work and that he be made whole.

Date: 8-25-2004 Signature: /s/ Richard Flowers
[State Exhibit 2]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fixed Route Operator Date Grievance Occurred: 8/13/2004

Subject of Grievance: Harassment – Tonnie Gallman

Statement of Aggrieved: I requested to have a passenger removes from my bus for Health & Safety reasons. Tonnie Gallman refused to let me have the police called. I request to have Tonnie Gallman drug tested as soon as possible.

Date: 9/4/2004 Signature: /s/ Richard Flowers
[State Exhibit 4]

FAX COVER SHEET

TO: HR M.M. Failing, Governor Minner, NAACP, WPVI, Local 842
Fax Number:
FROM: R. Flowers
Sender's Phone #: xxx-xxx-xxxx [4]
RE: Discharge of R. Flowers
Attached:
DATE: 9-4-2004
File #:

MESSAGE: I was fired for keeping my self and my passengers safe. I request a Step 4 Hearing.
[State Exhibit 5]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Bus Driver Date Grievance Occurred: 9-2-2004

Subject of Grievance: I was fired – pretermination hearing

[4] There is no dispute that the faxes reached DTC management. All eleven complaints were introduced through DART Director of Operations William Hickox.

Statement of Aggrieved: I request a Step 4 Hearing. I was fired for not signing a Last Chance Agreement. Charles Moles would not tell me what I did. He just said sign or I would be fired. No such step in 842 contract. No just cause or chance to face witnesses.

Date: 9-4--2004 Signature: /s/ Richard Flowers
[State Exhibit 5A]

FAX COVER SHEET

TO: Raymond Miller
Fax Number: xxx-xxx-xxxx
FROM: Richard Flowers
Sender's Phone #: xxx-xxx-xxxx
RE: Driver Fired
Attached:
DATE: 9-7-2004
File #:

MESSAGE: I request to return to work with back pay or I request a Step 4 Hearing with the State Deputy Director for Employee Relations. Time is of the essences.
[State Exhibit 6]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Bus Driver Date Grievance Occurred: 9-2-2004

Subject of Grievance: Unfair Labor Practices - Fired

Statement of Aggrieved: I request to be returned back to work with pay. Pre-term hearing – not in the Union contract with Local 842 ATU. Request for Contract Grievance Procedures to be followed to the letter of the law. I request a Step 4 hearing. Time is of the essences..

Date: 8-7-2004 [sic] Signature: /s/ Richard Flowers
[State Exhibit 7]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fixed Route Driver Date Grievance Occurred: 9-2-2004 9/10/2004

Subject of Grievance: Unfair Labor Practices

Statement of Aggrieved:

1) Not accepting grievances timely
2) Violation of the Union Contract
3) Restricted from Union Members and Buildings
4) Refused to return me to work with pay
5) Refused to let me meet with State Personnel Deputy Director timely
6) Violation of Just Cause Sec. 9 of Union Contract
7)

Date: 9/13/2004 Signature: /s/ Richard Flowers

Signed by Wali W. Rushdan on 9/16/04
[State Exhibit 8]

FAX COVER SHEET

TO: W.B. Hickox, Ray Miller, Nathan Hayward
Fax Number:
FROM: Operator Richard N. Flowers
Sender's Phone #: xxx-xxx-xxxx
RE: Discharge of R. Flowers
Attached: CC. Gov Minner
DATE: 9-20-2004
File #:

MESSAGE: UNFAIR LABOR PRACTICES

1. Refuse to act on grievances – No Just Cause
2. Restrict me from DART grounds – No Just Cause
3. Refused to return me back to work with back pay.
4. Request for Step 4 hearing – Time is of the essences.

[State Exhibit 9]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fired Driver Date Grievance Occurred: 9-2-3-2004

Subject of Grievance: Unfair Labor Practices

Statement of Aggrieved:

1) Fired without just cause
2) UNION BUSTING
3) Interference in Union Business
4) Prohibited Acts – Bath Room – Lunch Breaks
5) Retirement Funds – (Operators v. Supervisors) ect- *[sic]*

Date: 9-23-2004 Signature: /s/ Richard Flowers
[State Exhibit 10]

AMALGAMATED TRANSIT UNION
Local Division No. 842 – Wilmington, Delaware
GRIEVANCE FORM

Aggrieved Employee: Richard N. Flowers

Classification: Fixed Route Operator Date Grievance Occurred: 8-13-2004

Subject of Grievance: "Denied Due Process" violation Del.Code

Statement of Aggrieved:

1) Employee has been denied "Due Process"
2) Employee has been suspended beyond 30 day, which is an illegal act by State Law (by the State of DE)
3) Illegally prohibited from site of Employment
4) Violation of Safety & Health of above Employee

Adjustment required – (A) Make employee whole. (B) Return employee to work immediately. (C) Reimburst *[sic]* above such employee all lost wages in the amount of $3,992.80 plus holiday pay $128.80 per day until the case is settle. Time is of the essence.

Date: 9-28-2004 Signature: /s/ Richard Flowers
[State Exhibit 11]

On or during the week of September 6, 2004, Mr. Flowers and other individuals who were or had been DTC operators and members of the ATU bargaining unit were involved in informational picketing at Rodney Square and the Monroe Street DTC facility. During the protest at Rodney Square, Mr. Flowers wore a sandwich board which read,

- DART COMMITS UNFAIR LABOR PRACTICES
- DART DOES NOT BELIEVE IN LUNCH BREAKS
- DART DOES NOT HONOR OUR CONTRACT LOCAL 842
  [Charging Party Exhibit 8]

On or about September 8, 2004, Chief of Operations Bill Hickox called and left the following message on Mr. Flowers' voice mail:

> Mr. Flowers, this is Bill Hickox. Since you are choosing not to return my call, let me leave this message for you. Hopefully you'll get it and then maybe you'll return my calls. But the message is this, I am in receipt of the grievances that you have filed. However, a proper procedure is to have the grievances signed by Union officials. And as such, the grievances cannot be accepted until they are signed by Union officials. So if you can get them signed by Union officials, then we will be happy to take those grievances and process them.

If you want to call me back and discuss it, I'll be happy to speak with you. *[Charging Party Exhibit 10]*

By certified letter dated September 14, 2004, Mr. Hick ox again advised Mr. Flowers that his grievances could not be accepted unless signed by an elected Union official and that if Flowers wished to pursue the grievances, he needed to resubmit them with an authorized Union signature. *[Charging Party Exhibit 1]* A second letter dated September 22, 2004, was sent to Mr. Flowers from the Executive Assistant to the Secretary of Department of Transportation which also advised Mr. Flowers of "the need to secure sanction from the officials of the Local Union." *[Charging Party Exhibit 4]*

By letter dated September 23, 2004[5], Mr. Flowers was advised that a "Two-Party Arbitration" concerning his termination was scheduled for October 5, 2004 and that the State Manager of Labor Relations had been appointed to serve as the arbitrator. That meeting was held on October 5, in DTC's Madison Street facility, at which time Mr. Flowers' grievance was denied. *[Charging Party Exhibit 6]*

ISSUE

1) Did DTC violate the Public Employment Relations Act by refusing to process the Charging Party's grievances; and/or

2) Did DTC violate the Public Employment Relations Act by discriminating against, threatening and/or disciplining Mr. Flowers based on his protected activity?

POSITIONS OF THE PARTIES

[5] Although this letter was issued prior to the September 28, 2004 termination letter from Secretary Hayward, Mr. Flowers had apparently been made aware that Mr. Moulds (following the August 23, 2004, pre-termination meeting) was recommending that Mr. Flowers be terminated. All of Mr. Flowers' complaints were filed on or before September 28, 2004.

Charging Party: Mr. Flowers asserts that he was fired from his job as a Fixed Route Operator for "marking off" during the middle of his run on August 13, 2004, rather than comply with a supervisor's directive to transport a passenger who had just threatened his life. He argues he was treated differently than other Operators because he was involved in concerted and protected activity. Mr. Flowers alleges DTC management was very aware of his "union activism" because he met with management representatives concerning the need to improve working conditions, specifically relating to meal and bathroom breaks for drivers.

Following the August 13, 2004 incident, Mr. Flowers filed numerous grievances which he asserts DTC failed or refused to process. He was also involved in informational picketing at Rodney Square bus hub in early September, 2004. He also charges he was fired in retaliation for "making waves".

DTC: The Employer did not fail or refuse to process Mr. Flowers' grievances. The numerous complaints that Mr. Flowers prepared in varying formats and sent to numerous and various people were contradictory, unclear and confusing. Some of the submissions indicated alleged violations of the collective bargaining agreement, while others cited OSHA, health and safety and/or unfair labor practice allegations. DTC made repeated good faith efforts through its Director of Operations to contact Mr. Flowers first by telephone, and later by letter, to ask for clarification as to the nature of the complaints and where, if at all, they fit under the contractual grievance procedure. All of the grievances in question were filed after the August 13, 2004, bus incident which was the bases for Mr. Flowers' termination.

DTC argues there was no evidence presented that Mr. Flowers was engaged in any protected activity until after the August 13, 2004 incident. He did not hold a Union office until well after his termination. His conversations with management concerning lunch and bathroom

breaks occurred as a result of a written warning issued to him because he violated policy in stopping for these purposes without permission.

The Charge should be dismissed as the Charging Party failed to establish that the employer knew about any protected activity he might have been engaged in. There is no reasonable basis on which to conclude that any sort of protected activity either influenced or motivated DTC in its decision to terminate Mr. Flowers.

DISCUSSION

The only issues properly before me are whether DTC violated the Public Employment Relations Act, as alleged, by failing or refusing to process Mr. Flowers' grievances and/or by discriminating against, threatening and/or disciplining Mr. Flowers based on his protected activity. Whether or not there was just cause for Mr. Flowers' termination is a question which arises under the collectively bargained agreement and is exclusively within the province of the contractual grievance procedure. Much of the testimony and evidence presented in this case related directly to the circumstances of Mr. Flowers termination, and thus is not relevant to the issue before PERB.

I. Did DTC violate the Public Employment Relations Act by refusing to process the Charging Party's grievances?

The existing collective bargaining agreement between DTC and ATU (12/1/02 – 11/30/07) includes Section 7 – "Disagreements, Disputes, Grievance Procedure" which provides in relevant part:

> Should any disputes or grievances arise between the ADMINISTRATION or the UNION, or any of its bargaining unit members, as to the interpretation, application, or operation of any provisions of this AGREEMENT, not specifically stated in this AGREEMENT, both parties shall endeavor to settle the questions in the simplest and most direct manner.
>
> The procedure shall be as follows unless any step therefore is waived by the UNION. Saturdays, Sundays and holidays shall be excluded in the calculation of

the time limits provided. A written request for an extension of the time limit by either party shall not be unreasonably denied. In applying the time limits set forth in this Section, the first day shall be the day following the event triggering the time limit.

STEP 1 Such dispute or grievance is to be taken up between the employee and the UNION representative and his or her Assistant Department Head or designee within 5 days of the date the facts are known to the grievant. If not resolved in Step 1, within 10 days of the incident, or within 10 days of the date the facts are known to the grievant, such dispute or grievance may be appealed to Step 2.

STEP 2 An appeal to Step 2 shall be committed to writing on the Grievance Forms provided by the ADMINISTRATION and presented to the Department Head. Such written appeal shall state the nature of the grievance, the date, time and location of the alleged grievance, and the Section of this AGREEMENT allegedly violated. The Department Head or their designee shall, within 5 days from receipt of the written grievance, investigate the grievance and render his decision in writing to the President of the UNION with a copy to the aggrieved employee. It is understood that any management person or designee handling any dispute at Step 2 of this grievance procedure shall not be the same management person or designee handling any dispute in any of the next steps dealing with the same grievance.

Step 3 If not resolved in Step 2, within 5 days from receipt of the Step 2 response, the UNION shall have the right to appeal the decision in writing to the Administrator or their designee. When such appeal is written the UNION shall describe the details of their dissatisfaction with the Step 2 decision. The Administrator, or their designee, will formally hear the grievance appeal. Such hearing shall be scheduled as soon as practical but not later than 10 days from receipt of written appeal request. The Administrator or their designee shall render a written response within 10 days of the appeal hearing.

Step 4 A sincere endeavor will be made by the ADMINISTRATION and the UNION to dispose of any difference arising out of the application of this AGREEMENT through conferences between the ADMINISTRATION and the UNION. If the grievance is still not resolved at this stage, a meeting will be held between the Union, and the State Deputy Director for Employee Relations ("Deputy Director)/Administration within 10 days of the written response at Step 3. If still not resolved at that meeting, the dispute or grievance may be referred to arbitration on request in writing by the UNION. Such request for arbitration shall be made no later than 45 days following the completion of the last applicable step.

ARBITRATION

A. The ADMINISTRATION shall select one arbitrator, and the UNION shall select one arbitrator, and the two shall meet immediately in an effort to effect a settlement within 15 days; or, failing in that, to select a third arbitrator who shall act as Chairman of the Arbitration Board. The third arbitrator shall be selected from the American Arbitration Association in the manner prescribed by the

organization . . .

> . . . D. In grievances involving discharge or suspension, if the arbitration award provides for reinstatement, the arbitrator shall have the power, according to the equities, to decide whether reinstatement shall be with full back-pay, partial back-pay, no back-pay, or full back-pay minus wages earned or unemployment benefits paid during discharge. Should the arbitrator award reinstatement, there shall be no loss of seniority and seniority shall accrue from the date of discharge or suspension.
>
> E. A grievance affecting one or more employees in the bargaining unit may also be presented by the UNION. The UNION shall have the further right to intervene as a party at any step of the grievance procedure whether or not an employee desires to present or withdraw a grievance. . . *Joint Exhibit 1*

On or about June 11, 2004, ATU Local President Jackie Herbert prepared the following memorandum to William Hickox, DTC Director of Operations:

> As you are aware there have been numerous grievances presented by our members with out the knowledge of the elected officials of the Union, it is not possible to keep up with the required provisions of our agreements if this practice is allowed to continue. It is additionally not the correct method of handling grievances as outlined in our agreement so effective immediately, please return all grievances not accompanied by an **elected** Union official's signature back to the individual for proper processing. *[State Exhibit 13]*

Both Mr. Herbert and Mr. Hickox testified without refute that this memorandum was prepared as a result of discussions between DTC and the Union concerning the Union's difficulties in keeping track of grievances that were being filed by individual bargaining unit members without the Union's knowledge.

The Probable Cause Determination issued on December 14, 2004, specifically referenced two letters sent to Mr. Flowers which related to his need to secure the signature of a Union official before his complaints could be addressed. The first correspondence was a Memorandum authored by William Hickox, DTC Director of Operations, dated September 14, 2004, and sent to Mr. Flowers by certified mail (return receipt requested).

> We are in receipt of your numerous grievance requests. However, none can be accepted unless signed by an elected Union official.
>
> Therefore, please be advised, should you wish to pursue the aforementioned grievances, you must resubmit them with a signature from an

elected Union official. Once received, they will be taken through the proper processes. *[Charging Party Exhibit 1]*

The second letter was dated September 22, 2004, and was authored by the Executive Assistant to the Secretary of the Department of Transportation, which provided in relevant part:

> On September 20, 2004, I received your 6- page fax alleging unfair labor practices on the part of the Delaware Transit Corporation (DTC).
>
> Under the authority of the Secretary of Transportation, I've consulted with DTC Operations Director William Hickox concerning the allegations expressed in the documents.
>
> As a member of the Amalgamated Transit Union (ATU) Local 842, you are bound by the terms and conditions of the collective bargaining agreement between ATU and DTC Management, ratified on December 1, 2002. The procedures therein identified for grieving matters are clear concerning the need to secure sanction from the officials of the Local Union.
>
> If you desire to proceed in earnest, please review the ratified agreement and contact the requisite union officials to obtain formal authorization for the grievances. *[Charging Party Exhibit 4]*

Mr. Flowers argues there is nothing in the collective bargaining agreement which requires that he secure the approval and signature of a Union official in order to process a grievance and that the employer therefore refused to process his grievances in violation of its statutory obligations. His argument is without merit. The grievance procedure is a mandatory subject of bargaining which under Delaware law must be included in collectively bargained labor agreements:

> (c) The public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, <u>through their collective bargaining representatives</u>, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative. 19 <u>Del.C.</u> §1313, *emphasis added*

There is nothing in the current collective bargaining agreement or in the memorandum of June 11, 2004, from Local Union President Herbert to the DTC Director of Operations which violates either party's duty to bargain in good faith. In fact, Section 7 of the parties' Agreement requires

Union involvement at all four steps of the grievance procedure and in the ultimate arbitration of unresolved grievances.

The statute addresses the right of an individual bargaining unit employee to bring a grievance but specifically guarantees the right and responsibility of the exclusive representative to be involved:

> (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present. [6] 19 Del.C. 1304.

This section of the PERA is based upon §9(a) of the National Labor Relations Act ("NLRA"). [7]

The United States Supreme Court explained the intent of the analogous NLRA §9(a) in *Emporium Capwell Co., v. Western Addition Community Org.*, 420 U.S. 50, 88 LRRM 2660 (1975) wherein it held that failure by an employer to notify the Union and to bargain with it concerning the adjustment of employee grievances and the imposition of discipline is a violation

[6] There is no evidence of record that Mr. Flowers specifically requested in writing to exclude ATU from involvement in his grievances pursuant to the last sentence of 19 Del.C. §1304(b).

[7] 29 USC Ch. 7, §9(a): Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment. [emphasis added]

of 29 USC Ch. 7, §8(a)(5)[8], because the right of the Union to be involved in all grievances is explicitly protected by §9(a).

> . . . The intendment of the *proviso* is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive representative, a violation of §8(a)(5) . . . The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation. . . FN 12, 88 LRRM at 2665.

Delaware Courts have held that where Delaware law is based upon or substantially identical to federal labor laws, this Board can be expected to adopt the federal precedent as guidance in deciding similar cases. Cofrancesco v. City of Wilmington, D.Del., 419 F.Supp 109, 111 (1976); State of Delaware, DHSS and PERB v. AFSCME, Del.Super., C.A. No. 99A-10-014 FSS, III PERB 1953, 1968 (2000). Such is the case here. To find otherwise would obliterate the fundamental premise of the law that employees choose, by majority, an exclusive bargaining representative which is then clothed with authority and responsibility to collectively bargaining on behalf of the bargaining unit with respect to terms and conditions of employment, including grievance procedures. The public employer is obligated to bargain in good faith exclusively with that bargaining representative and is bound by agreements reached in that process.

The collective bargaining agreement is negotiated by and between the employer and the exclusive bargaining representative which acts on behalf of the bargaining unit, and binds those parties. The grievance procedure is a critical part of the agreement.

> The grievance procedure lies at the heart of the continuous collective bargaining obligation and constitutes the primary vehicle by which the parties' agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance process in accordance with the agreed upon contractual terms. Indian River Education Assn v. Bd. of Education, Del.PERB, ULP 90-09-053, I PERB 667, 674 (1991).

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[8] Section 8 (a) It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). *This NLRA section is analogous to 19 Del.C. 1307(a)(5).*

The US Supreme Court clarified the centrality of the Union's role as an exclusive representative in acting on the collective interests of the bargaining unit.

> Central to the policy of fostering collective bargaining, where the employees elect that course, is the principal of majority rule. If the majority of a unit chooses union representation, the NLRA permits them to bargain with their employer to make union membership a condition of employment, thereby imposing their choice upon the minority. In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefit of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. As a result, 'the complete satisfaction of all who are represented is hardly to be expected.' *[citations omitted]* Emporium Capwell, (Supra at 2665)

The statute protects the rights of the employer and the exclusive bargaining representative to administer that their agreement. The grievance procedure is not subject to modification by parties or persons other than the employer and the union, and only then by mutual agreement.

Mr. Flowers was clearly and appropriately instructed by DTC and DOT administrators as to the steps he needed to take to move his complaints forward under the negotiated procedure. It is undisputed that his complaints were sent to numerous individuals both internal and external to State government and many outside of the DTC. Any complaints not properly addressed and delivered to DTC representatives as required by the contractual grievance procedure were not considered in resolving this charge because they are not grievances under the collective bargaining agreement. Consequently, DTC cannot be found to have failed to process matters which were never subject to the negotiated grievance procedure.

Mr. Flowers was offered the opportunity to discuss the processing of his complaints at the beginning of the October 6, 2004, Step 4 hearing concerning his termination, at which Union representatives were present. During that hearing he admitted he had received Mr. Hickox's telephone messages requesting that Mr. Flowers call to discuss the processing of his complaints. Having been provided with telephone messages, correspondence and in person invitations to discuss the further processing of his complaints, and declining or refusing to respond to any of

them, there is no support for the charge that DTC failed or refused to process Mr. Flowers grievances in violation of its duty to bargain in good faith with ATU.

II. Did DTC violate the Public Employment Relations Act by discriminating against, threatening and/or disciplining Mr. Flowers based on his protected activity?

The Public Employment Relations Board first addressed a charge of interference or discrimination based on protected activity in Colonial Education Assn. and Pry v. Board of Education (ULP 88-05-023, I PERB 343 (1988), a case which alleged that the local association president was publicly upbraided for her absences from the classroom (during which she used negotiated release time for Association business) after she questioned the Board of Education and administration in a statement she delivered at a public Board meeting.

The decision noted that §(a)(3) prohibits public employers from taking adverse actions with regard to the terms and conditions of employment of employees who have engaged in ". . . concerted activities for the purpose of collective bargaining or other mutual aid or protection in so far as any such activity is not prohibited by [the PERA] or any other law of the State." 19 Del.C. §1303(3).

The statute does not, however, ". . . prohibit employers from applying their established rules and disciplinary standards to union activists in a manner consistent with that in which these standards are applied to other employees." Colonial (Supra at 353). The critical question in determining whether a violation has occurred is whether the employer acted because the employee was engaged in protected activity (a prohibited motive under the statute) or whether the employee was subject to corrective action consistent with the employer's treatment of employees in similar situations.

In Wilmington Firefighters Association, Local 1590 v. City of Wilmington (ULP 93-06-085), II PERB 937, 955 (1994), the PERB adopted the NLRB Wright Line[9] analysis differentiating between a pretextual and dual motive animus.

> A 'pretextual' case involves a situation where there is no legitimate business justification for the action taken by the employer against an employee who has engaged in protected activity, and the reason proffered clearly either did not exist or was not relied upon. Wilmington Firefighters, at 955.

The present case is clearly not a pretextual case because it is undisputed that the incident for which Mr. Flowers was terminated did occur on August 13, 2004, and that he did "mark off" rather than transport a passenger as instructed by a supervisor. The unrefuted testimony of both Jackie Herbert (DTC Driver and former ATU President) and Charles Moulds (DTC Chief of Transportation, Supervisor of Northern Fixed Routes District) established that employees have consistently been terminated for refusal to follow direct instructions from supervision in the past.

In dual motive animus cases, the employer relies upon a legitimate, non-discriminatory purpose as the basis for its adverse employment action. WFFA, (Supra at 956). The ultimate question to be answered is whether the charging party's employment was, in fact, adversely affected because the employer sought to retaliate based (at least in part) of the employee's exercise of protected rights.

For Mr. Flowers to prevail in this case, he must first establish a *prima facie* case by establishing three elements:

1) That he was engaging or had engaged in protected activity prior to his discharge;

2) That DTC management had knowledge of his protected activity; and

3) That retaliation for those protected activities were a substantial or motivating factor in DTC's decision to terminate Mr. Flowers.

[9] 251 NLRB 1083, 105 LRRM 1169 (1980).

The Public Employment Relations Act at 19 Del.C. §1303 enumerates the rights of public employees similar to the rights protected for private sector employees by Section 7 of the National Labor Relations Act. The PERA specifically protects the right of a public employee to:

> (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
>
> (2) Negotiate collectively or grieve through representatives of their own choosing.
>
> (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
>
> (4) Be represented by their exclusive representative, if any, without discrimination.

Applying similar language from Section 7 of the NLRA (on which the PERA is modeled), the National Labor Relations Board held in NLRB v. Meyers Industries, Inc., 115 LRRM 1025 (1984), that actions must first be "concerted" before they can be deemed to be protected. In cases where the employee's action is not based specifically on a right which arises under the negotiated collective bargaining agreement individual employee concerns, even if openly manifested by several employees on an individual basis, are not sufficient evidence to prove concerted action. The NLRB defined the standard for finding that an employee's activity is "concerted":

> In general to find an employees' activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and behalf of the employee himself. Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [10]

[10] The NLRB noted in FN 23 of its decision: "Under this standard, an employee 'may be discharged by an employer for a good reason, a poor reason or no reason at all, so long as the terms of the statute are not violated.' NLRB v. Condenser Corp. of America, 128 F.2d 67, 75, 10 LRRM 483 (3d.Cir 1942). Thus, absent special circumstances like NLRB v. Burnup & Sims, 379 US 21, 57 LRRM 2305 (1964), there is

> . . . It will no longer be sufficient . . . to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby.
>
> . . . We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence. *Meyer, Supra at 1029.*

It is important to again note that because the employer's action may not rise to the level of an unfair labor practice under the PERA, does not preclude the possibility that the same disciplinary action may be found to violate the just cause provision of the collective bargaining agreement. Where the employer's action is alleged to have violated that just cause provision, the employee's proper recourse is through the negotiated grievance and arbitration procedure.

Turning to the facts in this case, Mr. Flowers argues he was engaged in a number of activities which are or should be protected under the PERA. Mr. Flowers testified he was an unsuccessful candidate on the local union ballot to attend the September 2004 ATU convention in Las Vegas, hoping to represent Local 842. He testified that he made his candidacy for this representative position known to Local 842 members prior to August 13, 2004 (the date of the incident for which he was terminated). There is no evidence of record that any of the DART management or supervision had any knowledge of Mr. Flower's candidacy or involvement in this matter of internal union business.

Mr. Flowers also agreed to assist fellow Driver Armond Walden in Walden's campaign to seek Union office. Although Walden and Flowers each testified that Walden's candidacy was unofficially announced early in 2004, none of the other twelve witnesses in this case testified to having any knowledge of the informal role in which Mr. Flowers allegedly served. Mr. Walden testified that he did not advise anyone in DTC management or supervision that he was running

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no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct." Meyers I (Supra at, 1029).

for office and, in fact, his name did not go into formal nomination until November, 2004, well after Mr. Flowers' incident on August 13, and termination on September 28, 2004.

Mr. Flowers testified that he has championed the need for lunch and bathroom breaks for bus operators during his employment. He asserted there are no procedures for drivers to break either for personal necessity or for a meal. His testimony however, was countered by the testimony of multiple witnesses, who testified that procedures do exist for both types of breaks, and there has been no significant issue with respect to either of these matters with operators. Mr. Flowers' witnesses all testified that they had heard about his lunch and bathroom complaints from him.

There was no corroborating evidence that Mr. Flowers discussed break issues with management or supervision other than within the context of verbal counseling and discussion of a written warning he received concerning his work performance. He had been counseled about taking his bus off route and in October, 2003, received a written warning for making mid-route stops while passengers were on the bus for non-emergency situations. *State Exhibit 12.* The record does not support a finding that the bathroom and meal break issue was anything more than a personal concern; therefore, any conversations between management and Mr. Flowers concerning this issue does not constitute concerted action.

Mr. Flowers also asserted that the protest in which he was involved in or around September 6, 2004, was protected, concerted activity for which he was discriminated against. The timing of this protest, however, refutes his allegation. Mr. Flowers was suspended pending termination on August 16, 2004. He participated (with Union representation) in a pre-termination hearing on August 25, 2004; by September 4, 2004, he had filed his first complaint that he had been unfairly terminated. *State Exhibits 5 and 5A.* There was no evidence of record that Mr. Flowers had been involved in informational or other picketing prior to September 6, 2004. Because this incident occurred after Mr. Flowers was aware that he was being terminated

(as evidenced by his antecedent complaints), there is no reasonable basis on which to conclude that the protest influenced DTC's decision to terminate him.

Mr. Flowers also testified that he had been involved in revising the ATU Local 842 grievance form with other bargaining unit members. The record established that management had no knowledge of the revision process, or involvement in the process. In fact, many of the bargaining unit witnesses testified that they were unaware of any role that Mr. Flowers played, other than that he introduced the form (which was revised largely in form rather than in substance) for acceptance by the Union membership at a general membership meeting.

Even when considered in a light most favorable to the Charging Party, the record in this case does not support a finding that the activities in which Mr. Flowers was engaged rise to the level of concerted action which is protected by the statute. Further, there was little if any evidence that management was aware that Mr. Flowers was playing any role in advancing issues relating to collective bargaining. The timing of the events on which Mr. Flowers relies does not support the conclusion that his termination was influenced by an illegal motive to remove him because he was an activist engaged in concerted and protected activity under the PERA.

Finally, Mr. Flowers also alleged in his charge that he was threatened by DTC "to stop making waves." This charge was never substantiated or attributed to any member of management and was not supported by evidence of record.

DECISION

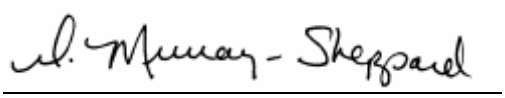
Consistent with the foregoing discussion, the charge is found to be unsupported by the evidence presented and is hereby dismissed.

I also take administrative notice that since the conclusion of this proceeding, a decision was issued in a separate but related unfair labor practice charge Mr. Flowers brought against ATU (ULP 05-02-468) in which the Executive Director noted that, by an arbitration decision

dated June 17, 2005, Mr. Flowers was reinstated to his Fixed Route Operator position with full back pay and benefits. The contractual arbitration process did operate to protect Mr. Flowers' rights and afforded him the remedy he unsuccessfully sought in the unfair labor practice forum.

IT IS SO ORDERED.

DATE: 8 December 2005



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.